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No. 10-765

Supreme Court, U.S.
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In the
Supreme Court of the United States

CYNTHIA YOUNG, on behalf of herself and all others similarly situated,
Petitioners,

v.

VERIZON'S BELL ATLANTIC CASH BALANCE PLAN and VERIZON COMMUNICATIONS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Plaintiffs' petition presents clear circuit splits on three issues that strike at the very heart of ERISA: whether and to what extent an employer can escape ERISA plan terms it has mistakenly promised its employees; whether any such relief must meet ERISA § 502(a)(3)(B)(i)–(ii)'s limited authorized purposes for equitable relief; and when such a claim must be made. Verizon's opposition brief attempts to downplay these splits in authority, but upon closer inspection, it only highlights them further.

Verizon also distorts the record throughout to justify the Seventh Circuit's decision. But there are three facts it cannot ignore: (1) the Plan unambiguously required the use of two transition factors in participants' pension calculations, App. 19a; (2) not a single participant testified that he or she "expected" to be paid under any formula other than the Plan formula, *id.* 21a–22a; and (3) every relevant Plan document and communication from Verizon promised that "the text of the Plan document" would always control over any conflicting document, *id.* 22a, 49a. So the Seventh Circuit should never have enforced Verizon's *subjective* intent over the clear *objective* terms of the Plan.

I. Verizon fails to reconcile the split in authority created by the Seventh Circuit's decision.

A. There is no uniform standard regarding reformation of scrivener's errors in ERISA plan documents.

Verizon mischaracterizes Plaintiffs as arguing that "reformation is never available under ERISA." Opp. 11. From this false premise, it surmises that, because the circuits have allowed reformation in one context or another, or have at least suggested it may be possible in dicta, there is no circuit split. *Id.* 10–15.

Verizon is arguing against a straw man. Plaintiffs have never argued that ERISA bars all reformation claims. To the contrary, Plaintiffs admit that drafting mistakes resulting in ambiguous or confusing language may be reformed. Pet. 15–16. An accidental omission of an important term is a good example. *See, e.g.*, *Int'l Union v. Murata N. Am. Inc.*, 980 F.2d 889, 907 (3d Cir. 1992); *Conkright v. Frommert*, 130 S. Ct. 1640, 1653–54 (2010) (Breyer, J., dissenting) (mistaken "failure to include language").

Verizon's argument that reformation is "unnecessary" for ambiguous plan terms because plan administrators can interpret ambiguities, Opp. 12, ignores the very cases upon which it relies. Verizon admits that, prior to this case, "only one court of appeals decision" in the history of ERISA had allowed reformation. Opp. 24. But that case allowed reformation only because the contradictory language created "an ambiguity." *Wilson v. Moog Auto., Inc. Pension Plan*, 193 F.3d 1004, 1009 (8th Cir. 1999). The

other case Verizon cites, *Murata*, 980 F.2d at 907, also dealt with an unclear (absent) term.

Reformation is appropriate for unclear language because participants are required to rely on their plan documents. So it advances ERISA's goals by clarifying participants' rights under the plan document, rather than misleading them.

Similarly, it would be consistent with the purpose prong of ERISA § 502(a)(3)(B)(i)–(ii) to reform a drafting mistake that results in an ERISA violation—say a cut-back in accrued, vested benefits—or a mistaken term that makes another "term of the plan" impossible to enforce—say a provision that paid all plan assets to one person, making it impossible to pay the remaining participants their promised benefits.

What is *not* consistent with ERISA, however, is retroactively changing unambiguous written plan terms, as the Seventh Circuit did here. App. 19a. The circuits have split on this important issue, applying irreconcilable legal standards. Pet. 10–23.

Most circuits (even the Seventh Circuit) recognize the inherent conflict (or "tension") between ERISA and any doctrine—such as the scrivener's-error doctrine—that allows an employer to retroactively eliminate vested retirement benefits. *See, e.g.*, App. 18a; *Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1445 (9th Cir. 1995); *Murata*, 980 F.2d at 907; *Moog*, 193 F.3d at 1008. Eliminating vested benefits based on a claim of mistake is worrisome because Congress enacted ERISA to ensure that participants may "*on examining the plan documents*, determine exactly what [their]

rights and obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (citing H.R. Rep. No. 93-1280, at 297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639).

As a result of this universally recognized tension, federal courts have generally imposed *greater restrictions* on the use of the common-law doctrine of scrivener's error when applied to ERISA plan documents than they would apply to a typical contract.

For example, the Ninth Circuit categorically prohibits parties from using the scrivener's-error doctrine to challenge "unambiguous" and "fundamental" ERISA plan terms. *Cinelli*, 61 F.3d at 1445. Contrary to Verizon's argument, the *Cinelli* court did not refuse reformation because of a "failure of proof." Opp. 14. Rather, the sufficiency of the evidence was irrelevant. *Cinelli*, 61 F.3d at 1445. The plan document was "unambiguous," and, therefore, it was necessary to enforce it to ensure that "an employee's rights and obligations can be readily ascertained from the plan documents." *Id.*

The Fifth Circuit applies the same limitation. In *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991), it held that "[a]ny burden of uncertainty created by careless or inaccurate drafting" rests on the employer who does the drafting and is "most able to bear that burden," concluding that "[a]ccuracy is not a lot to ask." That is why "the Fifth Circuit would not follow" the Seventh Circuit's approach. *Humphrey v. United Way of Tex. Gulf Coast*, No. 05-758, 2010 WL 4791486, *20 (S.D. Tex. Nov. 15, 2010).

Similarly, the Third Circuit will not allow an inquiry into the intent of the parties to an ERISA plan unless the plan language could not be reasonably relied upon.[1] *Murata*, 980 F.2d at 907. Although Verizon argues that the Third Circuit sanctioned reformation in *Murata* merely to avoid a "windfall," Opp. 14, that is false. In fact, the Third Circuit recognized that granting reformation there would create a windfall—to the employer. *Murata*, 980 F.2d at 907. Instead, the Third Circuit keyed its analysis on what a participant would understand upon "reading the Plan documents" *only*. *Id.* The Eighth Circuit follows the same reasoning. *Moog*, 193 F.3d at 1009 (reformation available only because "taken together the writings create an ambiguity concerning employee eligibility for early retirement").

The Fourth Circuit, for its part, has applied a strict mutual-mistake requirement in a trio of cases. *Cross v. Bragg*, 329 Fed. Appx. 443, 454–55 (4th Cir. 2009); *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 642–43 (4th Cir. 2007); *Audio Fidelity Corp. v. PBGC*, 624 F.2d 513, 518 (4th Cir. 1980). Verizon complains that these cases did not find a scrivener's error. Opp. 12–14. But that is the point. The Fourth Circuit requires a true *mutual* mistake to establish a "scrivener's error"—not a unilateral drafting mistake by the employer, which is not reformable under contract law. *See Stanford v. Foamex L.P.*, No. 07-4225, 2010 WL 3488651, at *9 n.14–16 (E.D. Pa. Aug. 31, 2010) (recognizing circuit split between Fourth

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[1] This threshold *objective* test is not found in the common-law standards for contract reformation. *See* Restatement (Second) of Contracts § 155 (1981).

Circuit and Seventh Circuit on mutual mistake requirement).

The Fourth Circuit also rejects the issue of actual participant reliance on the plan document as legally irrelevant. *Cross*, 329 Fed. Appx. at 455. And it enforces written plan terms—even if the employer "did not intend" them—on the basis that benefits described in a written plan are not windfalls, they are "earned." *Audio Fidelity*, 624 F.2d at 517–18.

But while the Ninth, Fifth, Third, Eighth, and Fourth Circuits *limit* the scrivener's-error doctrine in ERISA cases, the Seventh Circuit *expands* it. Contrary to the Ninth and Fifth Circuits, it will reform even the most crystal-clear, material plan terms. App. 19a. Contrary to the Third and Eighth Circuits, it does not focus on reasonable, objective reliance on plan documents. *Id.* And, contrary to the Fourth Circuit, it opens up the scrivener's-error doctrine to unilateral mistakes, takes into account subsequent participant "reliance," Opp. 17, and allows perceived "windfalls" to affect its decision-making, App. 17a–18a.

This disparity among the federal courts is antithetical to ERISA's goal of "provid[ing] a uniform regulatory regime over employee benefit plans," *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004), and requires this Court's review.

B. The decision below conflicts with *Kennedy*.

Verizon also fails to reconcile the lower court's decision with *Kennedy v. Plan Adm'r for DuPont Savs. & Inv. Plan*, 129 S. Ct. 865, 875–76 (2009), which unanimously held that ERISA forbids applying the

federal-common-law doctrine of waiver to pension benefits. *Kennedy* grounded its holding on the plan-documents rule, which forbids inquiries into "nice expressions of intent" or examining "a multitude of extrinsic documents," because they hinder beneficiaries' right to "get what's coming quickly, without the folderol essential under less-certain rules." *Id.* The scrivener's-error doctrine violates all of these prohibitions to an even greater degree than the doctrine of waiver.

Verizon's first response to this obvious conflict is that it could have instituted rules to allow the plan administrator to use "documents outside of the plan's governing documents" to administer benefits—that is, to trump the actual plan terms. Opp. 18. But even if Verizon had that flexibility, it chose the *opposite* rule. The communications the Seventh Circuit enforced over the actual Plan text contained an explicit procedural term that "If there is any conflict between the Plan document and this brochure, the text of the Plan document is controlling." App. 49a. Verizon should be held to that choice.

Verizon's second argument is that Plaintiffs "vastly overstate" the degree and frequency of discovery-intensive inquiries under the scrivener's-error doctrine because such claims are subject to a high evidentiary standard. Opp. 19. This argument is a non sequitur. Why would requiring *more* proof to establish a claim make the discovery regarding the claim less intensive? Precisely the opposite is true.

Neither do heightened pleading standards necessarily lead to less litigation. After all, the Private Securities Litigation Reform Act of 1995 did not

decrease the number of securities-fraud lawsuits, *see* Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. Ill. L. Rev. 913, 976 (2002), let alone change their "discovery-intensive" nature.

The scrivener's-error doctrine inherently involves a "fact-bound" inquiry, Opp. 11, into the intent of the parties and the examination of "a multitude of extrinsic documents." *Kennedy*, 129 S. Ct. at 876.[2] Even the Seventh Circuit acknowledged that its decision would create an "added litigation burden," contrary to *Kennedy*. App. 19a. That is an understatement. In this case, the "added litigation burden" included four-years'-worth of litigation, the review of hundreds-of-thousands of non-plan documents, depositions of numerous witnesses (with faded memories), and a trial involving hundreds of complicated exhibits in an attempt to divine the decade-old intent of a multinational corporation and some 14,000 of its employees. Pet. 8–10. Compare that to the inquiry into a divorce decree and the intent of a divorcing couple that was rejected as too burdensome by a unanimous Court in *Kennedy*, 129 S. Ct. at 875–76.

Finally, Verizon attempts to distinguish *Kennedy* on the grounds that it did not involve "a discrepancy between the formal plan document and any other plan document." Opp. 18. But neither does this case. No *plan document* conflicted with the Plan here, and Verizon does not argue otherwise. The Seventh Circuit

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[2] Even if Verizon were correct, and there were a single standard across the circuits regarding scrivener's errors under ERISA, that standard would require review in light of *Kennedy*.

enforced cherry-picked sections of non-plan-document communications instead of the clear Plan language. That flies in the face of *Kennedy*.

C. The decision below conflicts with this Court's decisions strictly limiting equitable relief under ERISA § 502(a)(3).

Congress explicitly limited equitable relief under ERISA § 502(a)(3)(B) to two allowable purposes: to "redress" violations or "enforce" the provisions of ERISA or an ERISA plan. Pet. 23–28; *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253 (1993). The Court has interpreted this "purpose prong" as a *jurisdictional* requirement. *See Peacock v. Thomas*, 516 U.S. 349, 353–54 (1996). Yet, the Seventh Circuit refused even to acknowledge the existence of the purpose prong in its opinion. Pet. 24.

Verizon has finally conceded that its reformation claim must satisfy the purpose prong. Opp. 22. Remarkably, however, it contends that the Seventh Circuit actively considered the purpose prong and ruled that Verizon's claim satisfied it by "enforcing 'the terms of the plan' as understood by the parties." *Id.* 21.

Not so. The Seventh Circuit never addressed this issue. Its opinion never even cites the relevant portion of the statute. Instead, the Seventh Circuit stated it was allowing reformation in order to further a "basic goal" of ERISA and "to avoid" what it perceived as an "unfair result." App. 18a. This judicial rewrite of ERISA was necessary because Verizon never attempted to tie its reformation claim to any "provision of [ERISA]" or the "terms of the plan," as required by § 502(a)(3)(B)(i)–(ii).

Verizon did argue halfheartedly below that it was seeking to enforce the parties' subjective "understanding" of the plan. Opp. 21. But the statute does not authorize that purpose, either. 29 U.S.C. § 1132(a)(3)(B)(i)–(ii); *see also Varity Corp. v. Howe*, 516 U.S. 489, 536 (1996) (Thomas, J., dissenting, with O'Connor & Scalia, JJ.) ("A rule turning on the subjective perceptions of plan participants is simply inconsistent with ERISA's fundamental structure, which is built not upon perceptions, but 'around reliance on the face of written plan documents.'"). Instead, like the rest of ERISA, it concerns itself with the objective, written "terms of the plan." 29 U.S.C. § 1132(a)(3)(B)(ii).

Plus, if enforcing an "understanding" were an authorized purpose, the Court would have reached a different result in *Peacock*, 516 U.S. at 353. There, the Court held 8 to 1 that the purpose prong barred an action because the complaint "alleged no violation of ERISA or the plan," *id.*, even though the parties "anticipated" the benefits would be paid, *Thomas ex rel. Tru-Tech, Inc. v. Peacock*, No. 7-91-3843-21, 1994 WL 16013214, at *7 (D.S.C. Oct. 28, 1992) ("it would be inequitable and unfair" to deprive participants "of their anticipated benefits"); *Thomas v. Peacock*, 39 F.3d 493, 504 (4th Cir. 1994) (participants entitled to "anticipated benefits").

The Seventh Circuit has read the purpose prong out of ERISA § 502(a)(3)(B). Its decision sets a dangerous precedent, and it cannot be allowed to stand.

D. The Seventh Circuit's accrual rule conflicts with every other jurisdiction's common law.

Verizon discovered its error in 1997. App. 13a. Despite knowing its potentially "devastating" effects, App. 2a, it slept on its rights for the next 10 years. As demonstrated in the petition, realistically, no court in the history of equity jurisprudence would allow reformation under these circumstances. Pet. 28–31.

Verizon does not dispute that a claim accrues when a party possesses a "complete and present cause of action." Opp. 22–23. Or that under the common law, a reformation claim accrues when a party "is or ought to be aware of" its mistake. *Id.* Or that the Fifth Circuit has recently applied this standard to bar a reformation claim. *Id.* Instead, it argues that the federal common law of accrual should be liberalized to take account of the "special nature and purpose of employee benefit plans." *Id.* 23.

This argument turns ERISA on its head. Congress imposed ERISA's fiduciary duties on plan administrators to protect participants. *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996). But the Seventh Circuit's decision encourages fiduciaries who discover mistakes to hide them from those participants for as long as possible, upending ERISA's entire fiduciary scheme.

This perversion of ERISA and rejection of 100 years of equity jurisprudence requires this Court's review.

II. The issues raised in the petition are exceptionally important and frequently recurring.

Verizon argues that this Court's review is unnecessary because, even after the Seventh Circuit's decision, reformation of ERISA plans will "continue to be a rarity." Opp. 25. It asserts that, because only two courts have ever authorized reformation of a drafting error, the issue is not worthy of this Court's review. *Id.* 24.

This argument elides the real issue—plan drafting errors occur frequently. As the Seventh Circuit acknowledged, drafting errors "take many forms." App. 19a; *see also Conkright*, 130 S. Ct. at 1644 ("People make mistakes. Even administrators of ERISA plans."). Articles abound discussing how courts deal with them. *E.g.*, Pet. 34; John L. Utz, *Correcting Scrivener's Errors in the Fourth Circuit? Forget About It!*, 17 No. 5 ERISA Litig. Rep. 6 (2009); Rosina B. Barker, *Is There a Scrivener's Error Doctrine in ERISA?*, 13 Benefits L.J. 59 (2000). And the IRS has developed procedures dealing with plan drafting errors in its EPCRS system. Pet. 34. As discussed in the petition at 10–11, there are dozens of reported cases of employers attempting to defend against paying benefits on the basis of a claimed mistake, and they are on the rise.

That drafting errors are rarely reformed does not make this Court's review any less critical. The federal courts apply different standards, with the Seventh Circuit now the most liberal. If its decision is allowed to stand, employers will challenge even perfectly clear plan language to avoid paying benefits. That will

inevitably force individual plaintiffs through expensive discovery into the corporation's intent, making most individual claims too expensive to litigate. The result will be less certainty among participants about their benefits, longer delays in payment of benefits, and more expensive ERISA litigation over the meaning of plan documents and the intent of employers. That is precisely what ERISA was designed to stop. *Kennedy*, 129 S. Ct. at 875–76.

CONCLUSION

The petition for certiorari should be granted.

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